NO. 80-1961

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

RAY JACKSON QUEEN,

Petitioner,

VS.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTIONS PRESENTED

1. Should the Fourth Amendment exclusionary rule be applied to revocation proceedings in State Courts?

2. Should the due process requirements of *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) requiring written findings of the evidence relied upon for revocation be examined in the light of *Jackson v. Virginia*, 443 U.S. 307 (1979), which requires that there be sufficient evidence in criminal proceedings to satisfy due process and determine if this interaction of due process requirements apply in revocation proceedings, and if so, was due process violated in this case?

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IN THE

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NO.

RAY JACKSON QUEEN,

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VS.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 271 Ark. 929, 612 SW2d 95 (1981). The opinion is set forth in Appendix "A" to this Petition.

JURISDICTION

The final order of the Arkansas Supreme Court was entered February 16, 1981 and Petition for Rehearing was denied, March 23, 1981, affirming the judgment as modified of the Sebastian County Circuit Court. The Judgment of the Circuit Court sentenced Petitioner to ten years for

burglary and five years concurrently for assault with intent to kill in the Department of Corrections. The Arkansas Supreme Court modified the judgment by dismissing the burglary offense and reducing the five-year sentence to three years. Notice of filing for Writ of Certiorari to review was filed in the Arkansas Supreme Court on February 27, 1981. A motion to stay the mandate of the Arkansas Supreme Court and to remain on bond was filed in the Arkansas Supreme Court on February 27, 1981. On March 23, 1981 the Arkansas Supreme Court entered an order granting Petitioner's motion to stay the mandate and to remain on bond.

The jurisdiction of the United States Supreme Court to review this decision by Petition for Writ of Certiorari is conferred by 28 U.S.C. Section 1257.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

The Provisions of the United States Constitution involved are Amendments 4 and 14.

Amendment 4 provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14, Section 1 provides as follows:

> All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT

On February 13, 1970, the petitioner pled guilty to two counts of burglary and one count of burglary of a coin-operated vending machine. On these three offenses the petitioner was placed on statutory probation for five years conditioned upon his good behavior.

On May 2, 1974, a petition to revoke petitioner's statutory probation was filed alleging that on April 30, 1974, he had been convicted of the misdemeanor offense of driving while under the influence of alcohol. On July 24, 1974, a hearing was held on the petition to revoke and on July 30, 1974, the petition was granted and the petitioner was sentenced to serve ten years in the penitentiary with five years suspended on one count of burglary and ten years suspended sentence on one count of burglary and the offense of burglary of a coin-operated vending machine with all the sentences imposed running concurrently.

On September 12, 1975, an information was filed in Sebastian County Circuit Court charging that the petitioner on July 21, 1975, committed the offense of assault with intent to kill. On February 26, 1976, the petitioner entered a plea of nolo contendere to the offense of assault with intent to kill and forgery and uttering. He was sentenced to serve five years in the penitentiary with three years suspended on both offenses to run concurrently with each other and consecutive to the five year sentence previously imposed on the above burglary charge.

On February 22, 1980, the State failed to petition to revoke all of the petitioner's suspended sentences alleging that he had violated his suspended sentences by committing

misdemeanor offenses on January 25, 1980, and on February 21, 1980.

On April 11, 1980, the State filed an amended petition to revoke all the suspended sentences against the petitioner alleging that he had violated his suspended prison sentences by committing the offenses of DWI, two counts of carrying a prohibited weapon (knife), drunk (2 counts), and felon in possession of a firearm. All of these alleged offenses are misdemeanors except for the felon in possession of firearm offense.

On April 21, 1980, the petitioner filed a motion to dismiss the petition to revoke on the grounds that the Court in the past had illegally imposed certain sentences in 1974 and 1976, after he had originally been placed on statutory probation on the three counts of burglary in 1970.

On April 21, 1980, the petitioner filed a motion to suppress items (shotgun and shells) searched for and seized from a residence at 919 South 19th Street and a vehicle parked on the premises. During the hearing on the petition to revoke, the items were permitted in evidence over the petitioner's objections and motion. This evidence was used in relation to the felon in possession of firearm offense.

On April 21, 1980, a hearing was held on the motion to dismiss, and after the hearing the court denied the motion. On the same date a hearing was held on the revocation petition. The State presented the testimony of six police officer witnesses. Officers Sam Sexton III, and William Cooper testified about the DWI and carrying a prohibited weapon offenses that allegedly occurred on January 25, 1980. Officer Rick Garrett testified about the drunk and

carrying a prohibited weapon offenses that allegedly occurred February 21, 1980. Sgt. Marshall, Officer Luther McGrew and Deputy Sheriff McAllister testified about the drunk and felon in possession of firearm offenses that allegedly occurred on April 9, 1980.

At the close of the hearing, the defendant renewed his motion to suppress and motion to dismiss which were overruled. Closing arguments were then made by both parties. The petitioner argued that there was not enough evidence and the State did not have a strong enough case to warrant revocation and a penitentiary sentence.

On April 21, 1980, the trial court orally found that there was enough evidence to set aside the suspended sentences on one burglary count and the offense of assault with intent to kill and sentenced the petitioner to ten years in the Department of Corrections on the burglary count and to five years in the Department of Corrections on the assault with intent to kill offense with the sentences to run concurrently. The Petitioner objected to these oral findings. (R. 108-109)

The petitioner orally moved that the trial court reconsider and reduce the sentence. The trial court overruled the motion and orally restated the same sentences.

On April 23, 1980, the petitioner filed a written motion to reduce the sentence on the grounds that the evidence submitted by the State showed only misdemeanor violations with the exception of the alleged offense of possession of firearm by a felon; there was no evidence that petitioner harmed any person physically or took or damaged the property of any person; and, the evidence did not justify such a sentence, nor did the punishment fit the results of

the petitioner's acts. On the same date, petitioner filed a notice of appeal to the Supreme Court if Arkansas.

On June 17, 1980, the trial court entered and furnished formal written findings and order of revocation in accordance with its oral order of April 21, 1980. (R. 15-16) However, all it states is that "testimony was presented before the court on the petition to revoke suspended sentences and upon conclusion of the testimony, the State proved by a preponderance of the evidence that the defendant, Ray Jackson Queen, violated the terms of his suspended sentence, as alleged by the State's petition to revoke, and that the suspended sentences in cases No. 1564 and CR-75-264 be set aside."

Petitioner appealed the written order of revocation of the Sebastian County Circuit Court to the Arkansas Supreme Court. He alleged that the trial court committed five errors in his trial or hearing proceedings. Among these was that the trial court erred in overruling petitioner's motion to suppress evidence because of an alleged search and seizure in relation to the felon in possession of firearm offense and that the trial court failed to prepare and furnish the petitioner a written statement of the evidence relied on to support the order of revocation.

On February 16, 1981, the Arkansas Supreme Court delivered its opinion and decision affirming as modified the order of revocation of the Sebastian County Circuit Court. The Arkansas Supreme Court held that the Fourth Amendment did not apply in revocation proceedings and that petitioner's argument that the trial court failed to make written findings must fail for want of an objection. However, the Court modified the sentences by holding that

the ten year sentence for burglary should be set aside because it was illegal and reduced the five year sentence for assault with intent to kill to three years in the Department of Corrections.

On February 27, 1981, petitioner petitioned the Arkansas Supreme Court for a rehearing. On March 23, 1981, the petition for rehearing was denied.

Petitioner now petitions this Court for a Writ of Certiorari to review the final order and judgment of the Arkansas Supreme Court.

ARGUMENT

Petitioner believes that the questions presented are substantial federal questions and require plenary consideration and warrant briefs on the merits and oral argument for resolution of these important questions. The reasons that the questions are substantial are set out below.

The first question to be discussed is the application of the Fourth Amendment to State Court revocation proceedings.

Petitioner presented this argument to the Arkansas Supreme Court in Point II of his brief on pages 49-54. This argument is reprinted in this petition as Appendix "D". In substance, petitioner argued that this was an illegal search and seizure, that the evidence should have been suppressed, and the items seized not be permitted in evidence in his revocation proceeding to support the allegation that he committed the offense of felon in possession of a firearm. That this was an illegal search and seizure appears to be unquestioned and that the evidence would not have been admitted in a criminal trial appears to be undisputed. The Arkansas Supreme Court appears to hold in this case that the search and seizure was illegal and the evidence would not have been admitted in a criminal trial. However, the Arkansas Supreme Court held that even though this was an illegal search and seizure, the Fourth Amendment did not apply to this revocation proceeding and cited as its authority *Harris v. State*, 270 Ark. 634, 606 SW2d 93 (Ark. App. 1980) and *Lockett v. State*, 271 Ark. 860, 611 SW2d 500 (1981). The *Lockett* case decided by the Arkansas Supreme Court is not authority for this holding because it did not involve an illegal search and seizure. The case involved due process and the Court held that a comprehensive

hearing on revocation of probation was not required and that all that was required was fundamental fairness with an opportunity to be heard. *Harris* was a lower court (Arkansas Court of Appeals) decision that did hold that the Fourth Amendment did not apply to revocation proceedings. Therefore, it appears that the Arkansas Supreme Court adopted this lower court decision as its own and this appears to be the settled law of Arkansas.

Therefore, with this background in mind, the question is squarely presented to this Court. This search and seizure was illegal, but even though illegal, is it proper to admit illegally seized evidence into a revocation proceeding?

Petitioner will start the discussion of this question with citation to an annotation in 77 ALR 3rd 636 entitled "Admissibility, in State Probation Revocation Proceedings, of Evidence Obtained through Illegal Search and Seizure". At the time of this annotation ten states held illegally seized evidence could be used in revocation proceedings and four states held that it could not. Rhode Island was added to this list of ten states in *State v. Spratt*, 386 A.2d 1094 (1978, Rhode Island). Florida (one of the ten) reaffirmed its holding in four cases that the illegally seized evidence could be admitted in revocation proceedings. This rule was eroded somewhat in Illinois in *People v. Watson*, 69 Ill. App. 497, 26 Ill. Dec. 19, 387 NE2d 849 (1979) and in Washington in *State v. Procter*, 16 Wash. App. 865, 559 P.2d 1363.

After the annotation was written, Georgia and Texas have stayed with their rule of not allowing illegally seized evidence to be used in revocation proceedings. *Giles v. State*, 149 Ga. App. 263, 254 SE2d 154 (citing the annotation) and *Moore v. State*, 562 SW2d 484 (1978, Tex. Crim.).

Since the annotation, Arizona has joined the four states that exclude the evidence and hold that the Fourth Amendment applies. *State v. Shirley*, 117 Ariz. 105, 570 P.2d 1278 (1977, App.).

The United States Supreme Court last had an opportunity to grant certiorari and decide the question presented herein in 1971. It chose not to accept the question at that time. *United States ex rel Lombardino v. Hegd*, 318 F. Supp. 648 (D.C. La., 1970) *Affd.* 438 F.2d 1027 (5th Cir. 1970), *Cert. den.* 404 U.S. 880, 92 S.Ct. 195, 30 L.Ed. 2d 160 (1971). This was over ten years ago and there has been an abundance of development in the law in this area since that time.

Thus, this Court has never decided the question of whether or not the Fourth Amendment applies in revocation proceedings. In other words, state courts have decided this important Federal question of substance not heretofore determined by this Court. There is a deep split in state court authority over whether or not the Fourth Amendment should apply in state revocation proceedings. At present, it appears that twelve states including Arkansas hold that the Fourth Amendment does not apply and five states hold that it does in state revocation proceedings.

In view of the fact that the state courts are split and divided on what is a substantial Federal question of Fourth Amendment rights involving thousands of people in this country, petitioner urges this Court to grant this petition and decide the question presented herein.

This Court should look at this case and determine if it was error for the Arkansas trial court and the Arkansas Supreme Court to refuse to enforce this important Federal

Fourth Amendment right in this state court proceeding. It is important that this case be accepted for decision because an important federal question of violation of Fourth Amendment rights of a petitioner in this type of situation is present and urgently calls for resolution by this Court because state courts are split on the question.

The second question to be discussed is the relation of the due process requirement of written findings in revocation proceedings and the due process requirement that there be sufficient evidence in criminal probation proceedings to prove to a rational trier of fact that a probationer violated his probation by a preponderance of the evidence.

The case of *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), held that Federal Due Process required that a probationer is entitled to a written statement by the fact-finders as to the evidence relied on and reasons for revoking probation. To meet this due process requirement and in accordance with *Gagnon, supra,* the Arkansas General Assembly enacted *Ark. Stat. Ann.* Section 41-1209(2) which requires that the trial court, in revoking a suspension or probation, prepare and furnish "to the defendant a written statement of the evidence relied on and the reasons for revoking suspension or probation". See *Rutledge v. State*, 263 Ark. 300, 564 SW2d 511 (1978).

However, *Rutledge* held that the failure to supply written findings was not error since the "Bill of Exceptions" signed by the trial court and approved as to form by the attorneys for the State and Appellant showed that the trial court relied upon the June 16, 1977, convictions and that it revoked the suspension based upon the convictions, that

it appeared that the trial court had complied with the requirements of the statute. (and due process?)

Petitioner herein argued in the Arkansas Supreme Court that *Rutledge* did not apply to his situation because, although, the "Bill of Exceptions was signed by the trial court, it was not approved as to form by the attorneys for both parties. Further, and more importantly, he argued that the record or "Bill of Exceptions" did not reflect what evidence the trial court relied upon for the revocations. He admitted that there was evidence offered to prove several offenses plus association with other felons, however, all the "Bill of Exceptions" showed was that the trial court found that "there was enough evidence to set aside the suspended sentence * * *". (R. 108) Petitioner further argued that the trial court made no specific finding as to any of the evidence to support the allegations of the State and that the general finding in the "Bill of Exceptions" and written order of revocation was not substantial compliance with the statute and due process of law.

The State argued to the Arkansas Supreme Court that the Bill of Exception signed by the trial court was substantial compliance with the statute and that petitioner's post-hearing motions clearly revealed his knowledge of the basis for revoking his suspended sentences.

The Arkansas Supreme Court rejected the arguments of both petitioner and the State and held that the argument that the trial court failed to make written findings must fail for want of an objection and cited *Lockett v. State*, 271 Ark. 860, 611 SW2d 500 (1981). This (*Lockett*) case cited *Wicks v. State*, 270 Ark. 781, 606 SW2d 366 (1980) and *Hawkins v. State*, 270 Ark. 1015, 607 SW2d 400 (Ark. App. 1980) as the authority for its holding.

Hawkins discusses the importance of these written findings and it clearly applies in the case at bar. The Arkansas Court of Appeals said that on purpose of the statute (and due process) requiring the written statement of evidence and reasons must be to permit the defendant to know the precise basis of the trial court's decision is so that he may conduct an intelligent appeal by being able to center it upon errors which could only be perceived if the decision process were known.

Wicks discusses the need for objections in order to preserve the ground for appeal in criminal cases. The court also discusses exceptions to this rule of proper objections such as the Federal Court "plain error" rule.

The finding of the Arkansas Supreme Court that no objection was made to the failure to furnish written findings is not supported by the record. The petitioner objected to this failure. (R. 108-109) He also objected to the oral findings by filing a motion to reduce the sentence on the grounds of lack of evidence and by filing a notice of appeal based on the oral findings. These appear to be proper objections. (See the argument in paragraph number 3 of petitioner's petition for rehearing filed in the Arkansas Supreme Court and made a part of this petition as Appendix "E"). In any event, an objection to preserve this right does not appear to be necessary. Why should a probationer have to object to a trial court's failure to do its statutory and constitutional duty? (See argument in Appendix "E"). This is plain error and the trial court clearly violated the due process clause of the Fourteenth Amendment to the United States Constitution.

Why is this constitutional due process requirement of written findings important? It is because most courts,

including Arkansas have the rule that the findings of the trial court must be supported by a preponderance of the evidence in order to be sufficient to revoke a suspended sentence. *Pearson v. State,* 262 Ark. 513, 558 SW2d 149 (1977). Therefore, written findings are necessary and important so that a probationer can intelligently test the sufficiency of the evidence for a revocation on appeal. Without these written findings, he is just or merely shooting in the dark in trying to overturn a revocation order.

Also, the requirement of written findings is important in the context of due process requirements that the evidence be sufficient to prove that a defendant violated his suspended sentence or probation by a preponderance of the evidence to a rational trier of fact. See *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), citing *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Thus, the due process requirement of written findings is extremely important. Because, how can a probationer intelligently test the trial court on the due process requirement of sufficiency of the evidence (Jackson) if the trial court has not provided or accorded petitioner the due process requirement of written findings (Gagnon)? It is impossible. So, it necessarily follows that these two due process requirements are interrelated and there is an interaction of the two and a violation thereof entitles him to a new hearing. There were no written findings so how is he to test due process evidentiary requirements? There is no way that he can and the due process requirements of those cases and their relation to each other has been violated.

This question involves an important and substantial

issue. It is substantial because, since *Gagnon,* Arkansas State Courts continue to erode away a state probationer's Fourteenth Amendment due process right of written findings of reasons for revocation under the guise of substantial compliance with due process (*Rutledge, supra*) or failure to object to this violation of due process (*Lockett, supra*) and this practice should be stopped. The State Courts of Arkansas and other state courts need more supervision by the United States Supreme Court in these probation or suspended sentence proceedings. The State courts are getting away from these due process requirements and they should be curtailed or stopped. It is important that this case be accepted for decision because this important federal question of violation of Fourteenth Amendment rights of a petitioner in this type of situation is present and urgently calls for resolution.

CONCLUSION

Petitioner submits that for the above reasons the petition for writ of certiorari should be granted and the case accepted for decision.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF ARKANSAS

RAY JACKSON QUEEN, A/K/A JACKIE QUEEN

vs.

STATE OF ARKANSAS

NO. CR-80-177

Opinion Delivered February 16, 1981

DARREL HICKMAN, *Judge*

This is an appeal from an order revoking a suspended sentence entered by the Sebastian County Circuit Court.

Ray Jackson Queen had several convictions in the Sebastian County Circuit Court which resulted in suspended prison sentences. The prosecuting attorney, alleging several instances of misconduct by Queen, filed a petition to revoke those sentences.

After a hearing, the court concluded that two suspended sentences should be revoked, one in 1974 for ten years and one entered in 1976 for five years. The revoked sentences were to run concurrently.

On appeal Queen alleges five errors. First, he challenges the legality of the suspended sentences. Second, he argues that inadmissible evidence was used against him. Third, he contends that his misconduct did not warrant revocation. Fourth, he argues that the revoked sentences were excessive for his misconduct and, finally, that the trial court failed to give a written reason for the revocation. We find that one revoked sentence was improper and the other

was excessive and we modify the sentence. We find no other errors.

The petition to revoke alleged that Queen had at least five suspended sentences. Three separate cases dated back to 1970 when Queen was placed on probation. Court orders in 1974 changed these probation orders to suspended sentences. Queen had a conviction for assault with intent to kill in 1976 with a partial suspended sentence. At the conclusion of the hearing in the present case, the trial judge stated that he would only consider two suspended sentences, the ten-year suspended sentence in connection with a burglary conviction that dated back to 1970 and the five-year suspended sentence imposed in 1976 in connection with the assault charge.

In 1970 Queen *pled guilty* to burglary and was sentenced to five years' statutory "probation." This probationary period was revoked in 1974 and Queen was sentenced to ten years imprisonment with the sentence suspended. This was clearly improper according to *Maddox v. State*, 247 Ark. 553, 446 SW2d 210 (1969) and *Cantrell v. State*, 258 Ark. 833, 529 SW2d 136 (1975). In those cases we dealt with "court probation" as imposed by the Sebastian County Circuit Court and we held in both that where the plea of guilty *was accepted*, a later revocation could not exceed the probation period. Here, the plea was accepted and the term of probation was five years. Consequently, a later suspended sentence for ten years was improper.

The other sentence revoked is one imposed in 1976 after the criminal code was adopted. On February 26, 1976, Queen entered a *nolo contendere* plea to assault with intent to kill. According to the docket sheets and commitment order the court sentenced Queen to five years imprisonment

with three years suspended — not five as the judge supposed. Undoubtedly the court was confused because there were so many cases before it, but the documents show that only three years were suspended and not five. The State virtually concedes this. Since the court originally imposed a five-year sentence and suspended three years of that sentence, it could only revoke the three-year suspended sentence. *McGee v. State,* 270 Ark. 611, —— SW2d —— (Dec. 22, 1980). Consequently, judgment in this case will be modified so that Queen is ordered to serve only three years imprisonment.

The appellant also makes the argument that this three-year suspended sentence was illegal because it was imposed consecutive to another ten-year sentence that was illegal. That argument is irrelevant because it was not ordered revoked after the ten years had run; it was ordered revoked during the five-year term originally imposed.

Queen argues that evidence used against him was obtained in an unlawful search. The police received a call that there had been a shooting and proceeded to the area of the shooting. After inquiry they came upon a vehicle in the yard of a residence. Several people were getting into the vehicle or were standing around it. All had been drinking. According to one officer three people were in the car and Queen was one of those people. The people were "huddled" together. The police officers asked them to get out and found a loaded shotgun in the front floorboard. On the porch of a nearby residence they found three shotgun shells which they seized. According to the testimony the safety was off on the shotgun and the gun was ready to fire. It appeared that the three people in the car were trying to hide the gun. The seizure of these articles did not

violate the constitutional prohibition against unreasonable search and seizure. The exclusionary rule, as it is applied in most cases, does not apply to every criminal proceeding. *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975); *Harris v. State*, 270 Ark. 634, —— SW2d —— (Ark. App. 1980). We recently held that it does not apply to a revocation proceeding. *Lockett v. State*, 271 Ark. ——, —— SW2d —— (Feb. 9, 1981).

The evidence of misconduct consisted of a conviction for driving while intoxicated and carrying a prohibited weapon in January, 1980. A month later Queen was found to be publicly drunk in a car that was driving the wrong way on a one-way street. According to officers this car attempted to elude the officers when they pursued it. There was evidence Queen was again intoxicated and involved in disorderly conduct in the shotgun incident. Ark. Stat. Ann. §41-1208(4) (Repl. 1971) provides:

> If the court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspension or probation, it may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation.

In Queen's case, the suspended orders read in part:

> 1. You must not violate any law, federal, state or local. If arrested or questioned by law enforcement officers you are to report the matter without delay to the Probation Office, Third Floor, County Courthouse, Fort Smith, Arkansas, in person or by letter, giving full details of the event.

2. You must not associate with persons who have criminal records, or who are known as bad characters.

3. You are to stay out of beer joints or other places or parts of town where the wrong kind of people may be found.

We cannot say the court was clearly wrong in its findings.

The final argument that the trial judge failed to make written findings must fail for want of an objection. *Lockett v. State, supra.* The judgment is modified.

Affirmed as modified.

APPENDIX "B"

IN THE SUPREME COURT OF ARKANSAS

RAY JACKSON QUEEN, A/K/A JACKIE QUEEN

VS.

STATE OF ARKANSAS

NO. CR-80-177

ORDER DENYING PETITION FOR REHEARING

The Court made the following order in the above styled case today:

Petition for rehearing is denied. Appellant's motion to stay mandate pending appeal to the United States Supreme Court is granted.

Dated March 23, 1981.

APPENDIX "C"

IN THE SUPREME COURT OF ARKANSAS

RAY JACKSON QUEEN, A/K/A JACKIE QUEEN

VS.

STATE OF ARKANSAS

NO. CR-80-177

NOTICE OF FILING FOR WRIT OF CERTIORARI TO REVIEW

Comes the Appellant-Petitioner, Ray Jackson Queen, and hereby gives notice of filing for Writ of Certiorari to review the final decision and opinion delivered on February 16, 1981 by the Arkansas Supreme Court affirming as modified the Judgment of the Sebastian County Circuit Court, dated June 17, 1980, and designate the entire Judgment, Opinion and Decision of the Arkansas Supreme Court to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under the provisions of 28 U.S.C. Section 1257(3).

/s/ Robert S. Blatt
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Filed on February 27, 1981.

APPENDIX "D"

IN THE SUPREME COURT OF ARKANSAS

RAY JACKSON QUEEN, A/K/A JACKIE QUEEN

VS.

STATE OF ARKANSAS

NO. CR-80-177

II.

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE OF AN ILLEGAL SEARCH AND SEIZURE.

On the night of April 9, 1980, Sgt. Cecil Marshall of the Fort Smith Police Department received a call that there had been some shots fired in the area of South 19th and "I" Streets. About 8:45 p.m. he responded to the call which was near the Von Hatten Bakery. The Police talked to Von Hatten who stated that he had heard the shots but did not know where they came from.

Marshall and others searched the area with no results. He then went to Dodson and 19th Streets to a car wash to wash his vehicle. He talked to two men who wanted directions and he proceeded to wash his vehicle. Two small boys rode up on their bicycles (age 8-10 years). They conversed with the officer and told him the shots came from 919 South 19th Street. The officer contacted the radio room and advised them of his information and went to that address.

Upon arrival the officer saw a gold colored Maverick sitting in the front yard. People were getting into the car.

He got out of his car, entered the yard, and Janie Queen and Rosemary Mendoza met him about half-way between the Maverick and the police car. He was about 12-15 feet from the porch and while they were telling him they knew nothing of the shots being fired, he saw two or three shotgun shells lying on the front porch, went over and picked them up, and saw that they had been fired.

When he first arrived Janie and Jackie Queen were sitting in the front seat of the vehicle on the driver's side. Janie was sitting between his legs as they were still out of the car. Karen Angel was in the middle and Randy and Rosemary Mendoza were on the right hand side of the vehicle. The officer asked them to get out of the car and as Jackie Queen exited the vehicle he saw the end of a shotgun barrel sticking out from under the seat, partially covered with a sweater, laying across the floorboard in front of the driver's seat. The officer seized the gun, handed it to another officer, and determined it was loaded.

When the officer told Jackie Queen to exit the vehicle he got out and went to the front porch and sat in a lounging chair. The officer ordered Queen to go back with the rest of the people on the other side of the vehicle. He then proceeded to further search the vehicle and found another item (spring) which he seized.

The officer determined that they had all been drinking and that the defendant was drunk. He arrested all five of the people present on various charges. (Janie Queen for discharging a firearm in the city limits).

Prior to the hearing, the defendant moved to suppress these items seized based on an alleged illegal search and seizure. When these items were offered in evidence (Exhibit

6 — shotgun, Exhibit 7 — shotgun shells) the defendant objected on the basis of the motion to suppress. (R. 80-81) After the defendant cross-examined the witness, he again objected to the introduction of the evidence. (R. 86) The motion and objections were overruled and the evidence was admitted as State's Exhibits 6 and 7 over the exceptions of the defendant. (R. 86)

1. The warrantless search, seizure, and arrest were without probable cause because the officers had no reasonably trustworthy information (two small boys on bicycles whose reliability had not been established) that an offense had been or was being committed. *Conor v. State,* 260 Ark. 172, 538 SW2d 304 (1976), and cases cited therein.

2. At most, merely a misdemeanor had been committed and an officer cannot make a warrantless arrest on a misdemeanor unless it is committed in his presence. *Ark. Stat. Ann.* Section 43-403; *Arkansas Rules of Criminal Procedure,* Rule 4.1; *Johnson v. State,* 100 Ark. 139, 139 SW 1117 (1911). This was not even a violation of a State Statute, it was merely the violation of a city ordinance prohibited discharging firearms. (*Fort Smith Ordinance* Section 19-21 (1976) provides that it shall be a misdemeanor to discharge any firearms in the City).

3. Before going to the residence at 919 South 19th to search the yard, porch, premises and vehicles located thereon, the police should have obtained a warrant. *Sanders v. State,* 262 Ark. 595, 559 SW2d 704 (1978), citing several cases; *Smith v. State,* 265 Ark. 104, 576 SW2d 957 (1979). See also *Sanders v. State,* 264 Ark. 433, 572 SW2d 397 (1978), wherein the court said that property seized that is located on one's person or at one's residence may not be seized without a warrant, or pursuant to other legal means.

The yard is part of the curtilage and the warrantless entry into the yard where the search and seizure was made was unlawful. *Sanders v. State,* 264 Ark. 433, 572 SW2d 397 (1978); *Durham v. State,* 251 Ark. 164, 471 SW2d 527 (1971).

4. Warrantless intrusion into the yard will not justify this search, seizure and arrest under the "Plain View" doctrine. There was no valid intrusion into the yard of the residence where the officer saw the items. *Smith v. State,* 265 Ark. 104, 576 SW2d 957 (1979).

5. The warrantless entry onto the premises (yard and residence at 919 South 19th) to arrest anyone found there absent exigent circumstances is illegal. *Payton v. New York,* —— U.S. ——, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); and, *United States v. Adams,* —— F.2d —— (1st Cir. 1980). Adams was decided May 28, 1980, and is not reported in the official reporter system at this time. It can be found in 27 Criminal Law Reporter 2257. See also *United States v. Killebrew,* 560 F.2d 729 (6th Cir. 1977) and *United States v. Reed,* 572 F.2d 412 (2nd Cir. 1978). State courts have also condemned this practice. *Commonwealth v. Williams,* 396 A.2d 1177 (Pa. Sup.Ct. 1978) and *People v. Trull,* 380 NE2d 1969 (Ill. App.Ct. 1978). There were no exigent circumstances here. The shots had been fired, a radio call was made, the officer talked to Von Hatten, the officers searched the area, the officer left the scene, the officer conversed with two citizens, he was washing his police vehicle, two small boys told him of the address, he called the address to the dispatcher, other officers were sent to assist, he proceeded to the address, and talked to two people in the yard before the discovery of the items was made. If there was probable cause to go there to search, seize and arrest, a

warrant should have been obtained because exigent circumstances were not present as the above sequence of events reflect.

6. The Fourth Amendment should apply in this probation revocation hearing and the evidence should be suppressed. This Court declined to settle this constitutional issue in *Schneider v. State,* 269 Ark. 245 (Advance Sheets, June 16, 1980). This recent case cited 77 A.L.R. 3rd 636 for a collection of cases on the point. The annotation reflects that some jurisdictions apply the Fourth Amendment to probation hearings and others do not.

The above reflects that there were, at least, five flagrant violations of our arrest, search and seizure procedures and principles. Defendant urges that the Fourth Amendment should apply in these probation cases. If not, the Fourth Amendment should apply, at least, on a case by case basis. Some cases it should apply, some it should not. Because of the violations herein, the Fourth Amendment should apply, the evidence be suppressed, and the findings of a suspended sentence violation on April 9, 1980 be reversed.

APPENDIX "E"

IN THE SUPREME COURT OF ARKANSAS

RAY JACKSON QUEEN, A/K/A JACKIE QUEEN

vs.

STATE OF ARKANSAS
NO. CR-80-177

PETITION FOR REHEARING

Comes the Appellant and petitions this Court for a rehearing and as grounds for the petition states:

1. That this Court erred in holding that the trial court could revoke a three-year suspended sentence when this Court should have dismissed the case.

2. This Court erred in holding that the Fourth Amendment exclusionary rule does not apply in revocation proceedings.

3. This Court erred in holding that the Appellant did not object to the trial court's refusal to give him specific written findings upon revocation.

SUPPORTING BRIEF

1. In the original brief, Appellant argued three reasons why the three-year sentence revocation was improper. This Court disposed of two of the arguments in its opinion. However, this Court overlooked the argument based on *Matthews v. State*, 265 Ark. 298, 578 SW2d 30 (1979). The trial Court held that the suspended sentence in number CR 75-83 had probably expired and denied the petition to it. If it had expired, it necessarily follows that

the sentence in number CR 75-264 that was the same (5 with 3 suspended) and ran concurrent with it had also probably expired. The three-year sentence should be wiped out.

2. Appellant submits that the opinion on this point is not clear and requests that the Court clarify its holding. Was the search legal and reasonable in all types of proceedings? Or, was it legal because this Court is holding that the Fourth Amendment exclusionary rule does not apply in revocation proceedings? *Lockett v. State,* 271 Ark. 860 (1981), does not give the answer because it does not involve a search and seizure. *Harris* cited by the Court is an appeals court decision which does give the answer. *Harris* held the search was bad and illegal but was reasonable because the exclusionary rule did not apply in revocation proceedings.

Is this Court adopting the Appeal's Court rule that was announced in *Harris* as its rule? Or, is the Court holding that this search would be legal in a regular criminal jury trial proceeding? This question needs to be answered because there may be further litigation on this point.

3. This holding that the Appellant did not object is not supported by the record. The trial Court entered an oral order of revocation on April 21, 1980. (Same wording as written order). The Appellant objected to it. (R. 108-109) The Appellant then objected to the oral findings by filing on April 21, 1980, a motion to reduce sentence based on the lack of evidence, and also filed on April 23, 1980 a notice of appeal based on the oral findings. These appear to be proper objections. The Court then entered written findings to the same effect. Does he then have a further duty to object again and again? The case of *Lockett v. State,*

271 Ark. 860 (1981) does not appear to be in point. There, no written findings were made at all. How is the Appellant to object? He is not in Court when the written findings are entered. Is he to do it orally in person or by telephone? Is he to do it in writing by letter or motion? What if the Court does not rule on the written or oral objection? Must you get a ruling? Must you insist or push for a new ruling? How far must you go? When can you exercise your right to appeal? This Court is placing an intolerable burden on the Appellant. An Appellant has the right to expect that a trial court will do its statutory duty and enter specific written findings. Can't we presume the trial court knows the law? Must you keep objecting and point out the law to the trial courts? The Appellant is entitled to a ruling on this point so that he can litigate his insufficiency of evidence claim. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). This case should be reversed.

CERTIFICATE: Counsel certifies that he believes there is merit to the petition and is not filing it for the purpose of delay.

/s/ Robert S. Blatt
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P.O. Box 1925
Fort Smith, Arkansas 72902

Filed 2-27-81.

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ALEXANDER L. STEVAS
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IN THE

Supreme Court Of The United States

No. 80-1961

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

Ray Jackson Queen ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD BE APPLIED TO REVOCATION OF PROBATION PROCEEDINGS IN STATE COURTS.

II.

WHETHER THE DUE PROCESS REQUIREMENTS SET FORTH IN *MORRISSEY V. BREWER*, 408 U.S. 471, 92 S.CT. 2593, 33 L.ED.2d 484 (1972) AND *GAGNON V. SCARPELLI*, 411 U.S. 778, 93 S.CT. 1756, 36 L.ED.2d 656 (1973), SPECIFICALLY, THE REQUIREMENT OF MAKING WRITTEN FINDINGS OF THE EVIDENCE RELIED UPON AND REASONS FOR REVOCATION, SHOULD BE EXAMINED IN LIGHT OF *JACKSON V. VIRGINIA*, 443 U.S. 307, 99 S.CT. 2781, 61 L.ED.2d 560 (1979) REGARDING A REVIEW AND DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE.

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IN THE

Supreme Court Of The United States

No. 80-1961

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

Ray Jackson Queen.....*Petitioner*

V.

State of Arkansas.....*Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 271 Ark. 929, 612 S.W.2d 95 (1981) and is reproduced in the appendix to the Petition for Writ of Certiorari at page A-1.

JURISDICTION

The petitioner relies upon 28 U.S.C. §1257 (3) as the basis of this Court's jurisdiction and facially the jurisdiction of this Court has been adequately presented based on the questions raised for review: the exclusionary rule set forth in the Fourth Amendment and the Fourteenth Amendment Due Process Clause of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioner has adequately set forth the constitutional provisions involved. The Arkansas state statute governing notice and hearings on revocation of suspension or probation, Ark. Stat. Ann. §41-1209 (Repl. 1977) is set out in respondent's Appendix "A".

STATEMENT OF THE CASE

On April 11, 1980, the State of Arkansas filed an Amended Petition to Revoke the Petitioner's suspended sentences alleging: on January 25, 1980, the Petitioner had been convicted in Municipal Court in Forth Smith, Arkansas of the offenses of driving while intoxicated and carrying a prohibited weapon; on February 21, 1980, the Petitioner has been arrested for the offenses of Public Drunk and Carrying a Prohibited Weapon, and had been in the presence of a known felon; and on April 9, 1980, the Petitioner committed the offense of Felon in Possession of a Firearm, Drunk and being in the presence of a convicted felon.

On April 21, 1980, a hearing was held in the Circuit Court of Sebastian County, Arkansas, on the State's Petition to Revoke. Witnesses called by the State included the following law enforcement officers: William Cooper, Rich Garrett, Cecil Marshall, Luther McGrew and Deputy Sheriff McAllister. The Petitioner did not testify nor were any witnesses called in his behalf.

On April 21, 1980, the Circuit Court of Sebastian County entered a written Order setting forth the offenses allegedly committed by the Petitioner as set forth in the State's Petition to Revoke and found that the Petitioner had violated the terms of his suspended sentences in two cases, case number 1564 and CR-75-264.

Except as otherwise indicated, the facts of the case are adequately set forth in the Petitioner's statement of the case.

SUMMARY OF RESPONDENT'S ARGUMENT

I. The respondent submits that the decision by the Arkansas Supreme Court in holding that the Fourth Amendment exclusionary rule does not apply to revocation

of probation cases is in line with the majority rule followed in other jurisdictions. The majority rule is not inconsistent with previous decisions by this Court evidencing a disinclination to expand the impact of the exclusionary rule.

II. Decisions in the Arkansas appellate courts regarding issues of due process in revocation of probation proceedings are not inconsistent with decisions in the United States Supreme Court. Ark. Stat. Ann. §41-1209 was enacted to extend to probation revocation proceedings the same due process requirements applicable in parole revocation proceedings as enunciated in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). The decisions of the Arkansas appellate courts reflect a rejection of the technical argument that a per se failure by the trial court to make written findings, absent a showing of resulting prejudice to a defendant, does not work a deprivation of fundamental fairness. There has been no showing that the petitioner was precluded from perfecting an intelligent appeal or that revocation of probation was not supported by the evidence.

REASONS FOR DENYING THE WRIT

I.

WHETHER THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD BE APPLIED TO REVOCATION OF PROBATION PROCEEDINGS IN STATE COURTS.

The petitioner raises two questions which it is asserted require consideration on review. The respondent initially notes that in Rule 17 of the Rules of the Supreme Court a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Rule 17 (1) sets out

the general but not the limited considerations governing review of state court decisions as follows:

* * *

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The first question presented by the petitioner is whether the Fourth Amendment exclusionary rule should apply to revocation of probation proceedings.

In Appendix "D" of his petition, the petitioner sets forth his argument presented to the Arkansas Supreme Court that evidence was illegally seized and, therefore, should have been suppressed at the revocation of probation hearing. In deciding this issue against the petitioner, the Arkansas Supreme Court discussed the factual circumstances of the search and seizure and held:

> The seizure of these articles did not violate the constitutional prohibition against unreasonable search and seizure. The exclusionary rule, as it is applied in most cases, does not apply to every criminal proceeding. *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975); *Harris v. State*, 270 Ark. 634, 606 S.W.2d 93 (Ark. App., 1980). We recently held that it does not apply to a revocation proceeding. *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981).

271 Ark. at 932.

Thus, contrary to the assertion by the petitioner, the Arkansas Supreme Court made a determination on appellate review that the items seized were not the fruits of an illegal search.

Moreover, the holding by the Arkansas Supreme Court that the exclusionary rule does not apply in revocation proceedings, citing *Harris v. State*, 270 Ark. 634, 606 S.W.2d 93 (Ark. App. 1980) and *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981) is not in conflict with decisions in other courts nor does it present a controversial issue which must be settled upon resolution by this Coiurt. In reaching a determination regarding the non-application of the exclusionary rule, both the Arkansas appellate courts have recognized that this is the majority rule followed in other jurisdictions. *Schneider v. State*, 269 Ark. 245, 599 S.W.2d 730 (1980), citing Annot. 77 ALR 3d 636, 30 ALR Fed. 824. It was further noted that this holding was consistent with the decisions of the United States Supreme Court and the Court's disinclination to extend the impact of the exclusionary rule. *Harris v. State*, 270 Ark. 634 (Ark. App. 1980); *Schneider v. State*, 269 Ark. 245, 599 S.W.2d 730 (1980), citing *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

The respondent submits that contrary to the allegations of the petitioner, there is no deep split among the various jurisdictions on this issue. As noted in Annot. 77 ALR 3d 636, 639, most courts have refused to extend the exclusionary rule to revocation proceedings. Neither do the cases cited by the petitioner in his petition bear out his argument regarding the number of jurisdictions that follow the majority rule.

For example, in *State v. Spratt*, 386 A.2d 1094 (R.I. 1978) the issue was squarely before the Rhode Island Supreme Court wherein the exclusionary rule was

determined inapplicable to revocation proceedings as being inconsistent with the purpose of non-admissibility of illegally seized evidence, *viz.*, to deter unconstitutional methods of law enforcement. The Rhode Island Supreme Court noted:

> The question is whether evidence obtained as the result of an illegal search and seizure may be used at a probation revocation hearing. Although we have not heretofore passed upon that question, courts elsewhere, without distinguishing between parole and probation revocation hearings, have almost unanimously ruled the evidence admissible. *United States v. Vandemark*, 522 F.2d 1019 (9th Cir. 1975); *United States v. Farmer*, 512 F.2d 160 (6th Cir.), *cert. denied*, 423 U.S. 987, 96 S.Ct. 397, 46 L.Ed.2d 305 (1975); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970); *In re Martinez*, 1 Cal.3d 641, 83 Cal. Rptr. 382, 463 P.2d 734, *cert. denied*, 400 U.S. 851, 91 S.Ct. 71, 27 L.Ed.2d 88 (1970); *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974); *People v. Dowery*, 20 Ill. App. 3d 738, 312 N.E.2d 682 (1974); *Dulin v. State*, Ind., 346 N.E.2d 746 (1976); *State v. Caron*, 334 A.2d 495 (Me. 1975); *State v. Kuhn*, 7 Wash. App. 190, 499 P.2d 49 (1972).

386 A.2d at 1094-1095.

Likewise, the same was held in *State v. Towle*, 609 P.2d 1097 (Ariz. App. 1980) where the rationale was expressed by the Court of Appeals of Arizona in terms of the proper function of the probation-parole system:

> The majority of courts hold that the exclusionary rule does not apply to parole and probation revocation proceedings. *U.S. v. Frederickson*, 581 F.2d 711 (8th Cir. 1978); *U.S. v. Winsett*, 518 F.2d 51 (9th Cir. 1975); *U.S. v. Farmer*, 512 F.2d 160 (6th

> Cir. 1975); *U.S. v. Brown*, 488 F.2d 94 (5th Cir. 1973); *U.S. v. Hill*, 447 F.2d 817 (7th Cir. 1971); *State v. Sears*, 553 P.2d 907 (Alaska 1976); *In re Martinez*, 1 Cal.3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970), cert. den. 400 U.S. 851, 91 S.Ct. 71, 27 L.Ed.2d 88; *People v. Atencio*, 525 P.2d 461 (Colo. 1974); *Croteau v. State*, 334 So.2d 577 (Fla. 1976); *People v. Dowery*, 62 Ill.2d 200, 340 N.E.2d 529 (1975); *Dulin v. State*, 346 N.E.2d 746 (Ind. App. 1976); *State v. Caron*, 334 A.2d 495 (Me. 1975); *State v. Thorsness*, 165 Mont. 321, 528 P.2d 692 (1974); *Commonwealth v. Davis*, 234 Pa. Super. 31, 336 A.2d 616 (1975); *State v. Spratt*, 386 A.2d 1094 (R.I. 1978). The rationale of the decisions is that since the exclusionary rule is operative in any event in all criminal prosecutions, the furtherance of its policy objectives achieved by extending the rule to parole or probation revocation hearings is insufficient to justify the concomitant impairment of the proper functioning of the probation-parole system. See also *State v. Robledo*, 116 Ariz. 346, 569 P.2d 288 (App. 1977).

609 P.2d at 1097-1098.

The majority rule was also followed in *Kinzer v. State*, 366 So.2d 874 (Fla. 1979), and *State v. Proctor*, 559 P.2d 1363 (Wash. App. 1977).

Some courts do apply the exclusionary rule in revocation proceedings where there is evidence of police harassment or misconduct, i.e., where police officers are aware of suspect's status as a probationer and evidence obtained in violation of the Fourth Amendment is excluded as a deterrent for police misconduct. See, e.g., *State v. Shirley*, 570 P.2d 1278 (Ariz. App. 1977); *Moore v. State*, 562 S.W.2d 484 (Tex. Crim. App. 1978); *United States ex rel. Lambardino v. Heyd*, 318 F. Supp. 648 (E.D. La. 1970) aff'd, 438 F.2d 1027 (5th Cir. 1970) *cert. denied* 404 U.S. 880, 92 S.Ct. 195, 30 L.Ed.2d 160 (1971).

The respondent also notes that the United States Supreme Court declined to review the question in *United States v. Farmer*, 512 F.2d 160 (6th Cir. 1975) *cert. denied*, 432 U.S. 987, 96 S.Ct. 397, 46 L.Ed.2d 305 (1975) and *In Re Martinez*, 463 P.2d 734 (Cal. App. 1970) *cert. denied* 400 U.S. 851, 91 S.Ct. 71, 27 L.Ed.2d 88 (1970).

No reason for granting review consistent with Rule 17 of this Court has been sufficiently presented by the petitioner. The respondent is only able to say with probable certainty that Georgia applies the Fourth Amendment exclusionary rule to revocation proceedings. *Adams v. State*, 264 S.E.2d 533 (Ga. App. 1980). The majority rule has been adopted by the Arkansas Supreme Court and its rationale thoroughly explored and found to be consistent with the decisions of the United States Supreme Court. A revocation hearing does not deprive a defendant of absolute liberty but only of conditional liberty dependent on the adherence to certain conditions. It is not a criminal prosecution and therefore all the rights that attach in prosecution do not equally apply in a revocation of probation proceeding. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). There is no issue presented which necessitates review and resolution by this Court.

II.

WHETHER THE DUE PROCESS REQUIREMENTS SET FORTH IN *MORRISSEY V. BREWER*, 408 U.S. 471, 92 S.CT. 2593, 33 L.ED.2D 484 (1972) AND *GAGNON V. SCARPELLI*, 411 U.S. 778, 93 S.CT. 1756, 36 L.ED.2d 656 (1973), SPECIFICALLY, THE REQUIREMENT OF MAKING WRITTEN FINDINGS OF THE EVIDENCE RELIED UPON AND REASONS FOR REVOCATION, SHOULD BE EXAMINED IN LIGHT OF *JACKSON V. VIRGINIA*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) REGARDING A REVIEW AND DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE?

The second question presented by the petitioner involves a due process argument regarding the duty of the trial court to make written findings when probation is revoked after a hearing. The petitioner asks this Court to consider this question in light of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and require a determination that there was sufficient evidence on which a rational trier of fact could base a decision to revoke probation.

First, the respondent submits that the petitioner makes no argument that the decision by the Arkansas Supreme Court in affirming the revocation of probation is inconsistent with that of any other jurisdiction.

In accord with *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), Ark. Stat. Ann. §41-1209 (Repl. 1977) was enacted to extend to probation revocation proceedings the same due process requirements applicable in parole revocation proceedings. Ark. Stat. Ann. §41-1209 (2) provides that "If suspension or probation is revoked, the court shall prepare and furnish to the defendant a written statement of the evidence relied on and the reasons for revoking suspension or probation." As stated in *Gagnon v. Scarpelli*, supra, the requirements set forth therein and enacted at Ark. Stat. Ann. §41-1209, supra, "serve as substantial protection against ill-considered revocation . . . ." 411 U.S. at 786.

The petitioner couches his argument that review should be granted on this issue in terms that the per se failure of the trial court to provide written findings is an error of such fundamental magnitude that review should be granted by this Court for purposes of supervising the Arkansas state courts.

The respondent submits that the picture is not as bleak as that painted by the petitioner.

Both the Arkansas Supreme Court and the Court of Appeals have considered the responsibility of the trial court to furnish a written statement of the evidence relied upon and reasons for revocation in light of the failure to do so. In *Hawkins v. State*, 270 Ark. 1016, 607 S.W.2d 400 (Ark. App. 1980) the Court of Appeals determined that one reason for the requirement is so that the defendant can ascertain the precise basis of the trial court's decision so that an intelligent appeal can be perfected. However, where there has been "substantial compliance" with Ark. Stat. Ann. §41-1209 (2) or a failure to object and call the deficiency to the trial court's attention, the Arkansas appellate courts have not found reversible error in the absence of any resulting prejudice to the defendant. The decisions of the Arkansas Appellate Courts heretofore reflect a rejection of the technical argument that a per se failure to make written findings, without more, is sufficient to prejudice a defendant and deprive him of fundamental fairness. *Rutledge v. State*, 263 Ark. 300, 564 S.W.2d 511 (1978); *Hawkins v. State*, 270 Ark. 1016 (Ark. App. 1980); *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981). In other words, unless the appellant establishes on appeal that the trial court's failure resulted in prejudice to him, such as, precluding the appellant from perfecting an intelligent appeal, the error is harmless. It is further noted that in the three cases cited above, *Rutledge v. State, supra; Hawkins v. State, supra;* and *Lockett v. State, supra*, there was a review on appeal of the evidence which supported the decision to revoke probation.

In the context of the petitioner's argument regarding preservation of the issue by objection, the respondent notes that the spirit of *Morrissey v. Brewer, supra*, was not to "create an inflexible structure for parole revocation procedures." 408 U.S. at 490. The rule in the Arkansas courts of refusing to presume that error is prejudicial unless such is clearly established is not in contravention to the inflexible standard approach. By analogy, but without advancing the demand-waiver rule, the respondent notes

that this Court has previously held that a criminal defendant has some responsibility in asserting and preserving his constitutional rights, e.g. the right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

The petitioner asserts in his argument that he objected to the trial court's failure to furnish written findings, and cites pages 108-109 of the trial court record in support. The respondent submits that a review of the discussion therein reveals that the matter was not called to the attention of the trial court. (See Appendix "E") Furthermore, a Motion to Reduce Sentence and Notice of Appeal cannot seriously be considered as objections to the trial court's failure to furnish written findings. (R. 17, 18-19, See Appendix "C" & "D").

However, it is more important to note that although the petitioner's per se failure argument is in terms of preclusion of an intelligent appeal, no where was that issue in those terms raised on appeal to the Arkansas Supreme Court. Neither is it argued that the Arkansas Supreme Court affirmed the revocation of the petitioner's probation with blatant disregard of the appellant's inability to intelligently appeal his case. To the contrary, the Arkansas Supreme Court reviewed the evidence of misconduct: a conviction for driving while intoxicated, carrying a prohibited weapon, separate incident of driving while intoxicated and an attempt to elude police officers, and another incident of intoxication and disorderly conduct. This evidence was considered in light of the appellant's conditions of probation and it was determined that the trial court was not "clearly wrong in its findings." 271 Ark. at 932-933.

Furthermore, the written order entered at the trial court level reflects a recitation of the offenses committed by the petitioner as alleged in the State's petition to revoke. The trial court specifically found that "upon conclusion of

the testimony, the State proved by a preponderance of the evidence that the defendant, Ray Jackson Queen, violated the terms of his suspended sentence, as alleged by the State's petition to revoke . . . ." The order as entered by the Sebastian County Circuit Court is set forth at Appendix "B".

See, *Kartman v. Parratt*, 535 F.2d 450 (8th Cir. 1976) where the federal district court found that the purposes of written findings are to determine whether there is a factual basis for revocation and to protect the probationer from a second revocation proceeding based on the same offensive conduct.

Last, the respondent contends that *Jackson v. Virginia*, 443 U.S. 307, 97 S.Ct. 2781, 61 L.Ed.2d 560 (1979) should not, of necessity be extended to apply to revocation of probation proceedings. Revocation of probation lies within the sound discretion of the trial court and the decision to revoke must be supported by a preponderance of the evidence. *Pearson v. State*, 262 Ark. 513, 558 S.W.2d 149 (1977). In contrast *Jackson v. Virginia, supra*, established a necessary safeguard where a criminal conviction is collaterally attacked by use of the federal writ of habeas corpus and a challenge has been made to the sufficiency of the evidence to support the conviction. Federal review is sanctioned, where the issue is sufficiency of the evidence to sustain a criminal conviction, to determine that every element of a criminal offense has been proven beyond a reasonable doubt in situations where a defendant's absolute liberty has been removed. In contrast, revocation of probation removes conditional liberty and is not a criminal proceeding.

The issue of the sufficiency of the evidence to support the revocation of probation was raised by the petitioner on appeal and decided adversely to him by the Arkansas Supreme Court. 271 Ark. at 929, 932-933. He should not now

be permitted to raise the issue again *via* certiorari to this Court under the guise of state court failure to afford minimum standards of due process.

CONCLUSION

The petitioner has not demonstrated that the ruling of the Arkansas Supreme Court on the issue of exclusionary rule is in conflict with the majority rule followed by other jurisdictions. Rather, the Arkansas Court's refusal to expand the impact of the exclusionary rule to revocation of probation proceedings is in accordance with well established and well reasoned precedent.

The petitioner has likewise failed to establish that the minimum standards of due process applicable in a revocation of probation proceeding have not been afforded him. Rather, the ruling on that issue is in harmony with applicable decisions of this Court.

For these reasons, the Petition should be denied.

Respectfully submitted,

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Attorney General

BY: ALICE ANN BURNS
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Attorneys for Respondent

APPENDIX "A"

ARKANSAS CRIMINAL CODE

41-1209. Notice and hearings on revocation of suspension or probation.—(1) A defendant arrested for violation of suspension or probation shall be entitled to a preliminary hearing to determine whether there is reasonable cause to believe that he has violated a condition of suspension or probation. Such hearing shall be conducted by a court having original jurisdiction to try criminal matters as soon as practicable after arrest and reasonably near the place of the alleged violation or arrest. The defendant shall be given prior notice of the time and place of the preliminary hearing, the purpose of the hearing, and the conditions of suspension or probation he is alleged to have violated. Except as provided in subsection (3), the defendant shall have the right to hear and controvert evidence against him and to offer evidence in his own behalf. If the hearing court finds that there is reasonable cause to believe that the defendant has violated a condition of suspension or probation, it shall order the defendant held for further revocation proceedings before the court that originally suspended imposition of sentence on defendant or placed him on probation. If the hearing court does not find such reasonable cause, it shall order the defendant released from custody, but such action shall not bar the court that suspended imposition of sentence on defendant or placed him on probation from holding a hearing on the alleged violation of suspension or probation or from ordering that the defendant appear before it. The hearing court shall prepare and furnish to the court that suspended imposition of sentence on defendant or placed him on probation a summary of the hearing, including the responses of the defendant and the substance of the documents and evidence given in support of revocation.

(2) A suspension or probation shall not be revoked except after a revocation hearing. Such hearing shall be

conducted by the court that suspended imposition of sentence on defendant or placed him on probation within a reasonable period of time, not to exceed 60 days, after the defendant's arrest. The defendant shall be given prior written notice of the time and place of the revocation hearing, the purpose of the hearing, and the condition of suspension or probation he is alleged to have violated. Except as provided in subsection (3), the defendant shall have the right to hear and controvert evidence against him, to offer evidence in his own defense, and to be represented by counsel. If suspension or probation is revoked, the court shall prepare and furnish to the defendant a written statement of the evidence relied on and the reasons for revoking suspension or probation.

(3) At a preliminary hearing pursuant to subsection (1) or a revocation hearing pursuant to subsection (2):

(a) the defendant shall have the right to confront and cross-examine adverse witnesses unless the court specifically finds good cause for not allowing confrontation; and

(b) the court may permit the introduction of any relevant evidence of the alleged violation, including letters, affidavits, and other documentary evidence, regardless of its admissibility under the rules governing the admission of evidence in criminal trials.

(4) A preliminary hearing pursuant to subsection (1) shall not be required if:

(a) the defendant waives a preliminary hearing; or

(b) the revocation is based on the defendant's commission of an offense for which he has been tried and found guilty in an independent criminal proceeding; or

(c) the revocation hearing pursuant to subsection (2) is held promptly after the arrest and reasonably near the place where the alleged violation occurred or where the defendant was arrested. [Acts 1975, No. 280, §1209, p. 500.]

APPENDIX "B"

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

STATE OF ARKANSAS PLAINTIFF

V. NO. 1562, 1564, 1565, 75-83, 75-264

RAY JACKSON QUEEN DEFENDANT

ORDER

Now on this Twenty-first Day of April, 1980, comes on before the Court the Petition to Revoke the suspended sentence of the defendant, Ray Jackson Queen, appearing in person and by his attorney, John Settle, and the State being represented by J. Lamar Porter, Deputy Prosecuting Attorney, and the Court being sufficiently advised doth find:

1. That on February 13, 1970, defendant appeared in Open Court with his attorney, Doug Parker, and after being advised of his rights, pled guilty to the charge of Burglary of a Vending Machine in No. 1562, and two counts of Burglary in No. 1564 and 1565. Defendant was placed on five (5) years probation on all three counts. On July 24, 1974, hearing was held on defendant's petition to revoke and on July 29, 1974, judgment was entered setting aside probationary sentences in 1562, 1564 and 1565, and the Court sentenced defendant to ten (10) years in the Arkansas State Penitentiary with five (5) years suspended in 1562; ten

(10) years in the Arkansas State Penitentiary, all suspended, in 1564; and, ten (10) years in the Arkansas State Penitentiary, all suspended, in Case No. 1565, said sentences to run concurrently. On February 26, 1976, defendant pled guilty to charges of Assault With Intent to Kill in CR 75-264 and Forgery and Uttering in CR 75-83, and in the former case was placed on ten-(10)-year sentence with five (5) years suspended, to run consecutively with the sentence then being served in Case No. 1562; and in CR 75-83 was given a five (5) year sentence with three (3) years suspended, to run concurrently with CR 75-264 and consecutively with No. 1562.

2. That a Petition to Revoke defendant's suspended sentences was filed in the above case numbers, the State of Arkansas alleging that the defendant had committed the offenses of DWI, Carrying a Prohibited Weapon (Two Counts), Public Drunk, Associating with Known Felons, and Felon in Possession of a Firearm.

3. That on this date, defendant appeared in person and by his attorney, John Settle, and testimony was presented before the Court on the Petition to Revoke suspended sentences and upon conclusion of the testimony, the State proved by a preponderance of the evidence that the defendant, Ray Jackson Queen, violated the terms of his his suspended sentence, as alleged by the State's Petition to Revoke, and that the suspended sentences in Cases No. 1564 and CR 75-164 be set aside.

4. Defendant appeared in person and by his attorney, John Settle, and after being afforded the right of allocution, was sentenced in Open Court in accordance with this Order.

IT IS THEREFORE ORDERED AND DECREED that the suspended sentence in Case No. 1564 be set aside and defendant sentenced to ten (10) years in the Arkansas Department of Correction and that the suspended sentence in Case No. CR 75-264 be set aside and defendant be

sentenced to five (5) years in the Arkansas Department of Correction, to run concurrently with sentence in Case No. 1564.

/s/ John Holland
JOHN HOLLAND
CIRCUIT JUDGE

APPENDIX "C"

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

STATE OF ARKANSAS PLAINTIFF

VS. NO. CR-1564

JACKIE QUEEN DEFENDANT

NOTICE OF APPEAL AND DESIGNATION OF RECORD

The defendant, Jackie Queen, hereby gives notice that he appeals the Judgment rendered herein on the 21st day of April, 1980, and designates the entire record as the record on appeal.

The defendant, Jackie Queen, through his attorney, certifies that he has ordered a copy of the transcript from the reporter.

/s/ John W. Settle
JOHN W. SETTLE
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Notice of Appeal on the State of Arkansas by delivering a copy to the Prosecuting Attorney's Office on the third floor of the Sebastian County Courthouse, on the 21st day of April, 1980.

/s/ John W. Settle
JOHN W. SETTLE

APPENDIX "D"

IN THE CIRCUIT COURT
OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT

STATE OF ARKANSAS PLAINTIFF

VS. NO. CR-1564

JACKIE QUEEN DEFENDANT

MOTION TO REDUCE SENTENCE

Comes now the defendant and for his Motion to Reduce Sentence alleges and states the following:

I.

That a hearing was held on a Petition to Revoke the suspended sentences of the defendant in the above-styled cases.

II.

That the Court denied the Petitions in No. CR-75-83, CR-1562 and CR-1565; and ordered the suspended sentence

in CR-1564 be set aside and sentenced defendant to ten years in the Department of Corrections; and further set aside the suspended sentence in No. CR-75-264 and sentenced defendant to five years in the Department of Corrections, and ordered that the sentences in CR-1564 and CR-75-264 should run concurrently.

III.

That this Court still retains jurisdiction of this matter.

IV.

That the evidence submitted by the State in support of the Petition to Revoke alleged only misdemeanor violations as a basis for revocation with the exception of the allegation that the defendant was a Felon in Possession of a Firearm.

V.

That there was no evidence that the defendant harmed any person physically, or took or damaged the property of any person, nor did the State make such allegations.

VI.

That the evidence does not justify such an extreme sentence, nor does the punishment fit the results of the defendant's acts.

VII.

That if the defendant is required to go to the Department of Corrections, he will most probably be required to serve more than half of the sentence before release.

WHEREFORE, defendant moves that the Court reduce his sentence and for all other relief to which he may be entitled.

/s/ John W. Settle
JOHN W. SETTLE
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the above Motion on the State of Arkansas by hand delivering a copy of same to the Prosecuting Attorney's Office, third floor, Sebastian County Courthouse, Fort Smith, Arkansas, on this 23rd day of April, 1980.

/s/ John W. Settle
JOHN W. SETTLE

Citation of Authority
Ark. Stat. Ann. Sections 41-1208, 41-1209

APPENDIX "E"

MR. SETTLE:

MR. SETTLE: Your Honor, I think Mr. Porter is misunderstanding my argument. I am saying that the initial revocation in 1974 was invalid; the way the Court set it up sets up the consecutive situation.

THE COURT: All right. On CR-1564 then I find there is enough evidence to set aside the suspended sentence, find the defendant guilty of Burglary and sentence him to ten (10) years in the Arkansas Department of Corrections.

On CR-1565 the Petition will not be granted; probation will remain in effect—that's ten years from 1974. Probation in CR-1565 will remain in effect until 1984.

On CR-75-264 I find there is enough evidence to set aside the suspended sentence and find—and sentence the Defendant to five (5) years in the Arkansas Department of Corrections, to run concurrently.

Appeal bond will be $15,000.

MR. SETTLE: Your Honor, I would ask the Court to reconsider that appeal bond. I know the appeal bond is high. I would also ask the Court to reconsider the amount of sentence. I feel in view of the amount of evidence presented that is an extremely stiff sentence.

THE COURT: Well, you have to consider all the circumstances and number of events and the fact that on two of these cases he was already on probation once in 1970; then they were set aside in 1974, so you have to take all those matters into consideration also.

MR. SETTLE: Your Honor, I would also ask the Court—at least state to the Court that I feel that the ten year suspended sentence in effect in CR-1565 again creates a suspended sentence situation like what had been concurrent suspended sentences.

THE COURT: I will reduce that appeal bond to $12,500. Let's make sure we are right here. In

CR-1562 the Petition is denied. In CR-1564 ten years, and CR-1565, suspended sentence remains in effect. In CR-75-83, deny the Petition. CR-75-264, five years concurrent. Appeal bond $12,500. Defendant will be given credit for his jail time.

Court is adjourned.

COURT ADJOURNED